IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 15, 2005 Session

MAYNARD M. GORDON d/b/a NEWS ANALYSIS v. HORIZON COMMUNICATIONS, INC.

Appeal from the Chancery Court for Maury County
No. 02-060 Jim T. Hamilton, Judge

No. M2004-02755-COA-R3-CV - Filed March 29, 2006

Maynard M. Gordon d/b/a News Analysis ("Plaintiff")[1] sued Horizon Communications, Inc. ("Defendant")[2] claiming, in part, that Defendant had breached a contract with Plaintiff. After a bench trial, the Trial Court entered an order finding and holding, *inter alia*, that Plaintiff had materially breached the contract and, therefore, was not entitled to recover under it. The Trial Court's order dismissed Plaintiff's complaint. Plaintiff appeals to this Court claiming that the Trial Court erred by holding 1) that Plaintiff breached the contract; 2) that Defendant did not waive Plaintiff's breach; and 3) that Defendant had not breached the contract. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

John C. Lyell, II and John R. Reynolds, Nashville, Tennessee for the Appellants, Maynard M. Gordon d/b/a News Analysis and News Analysis, Inc.

Glenn Cox, Columbia, Tennessee for the Appellee, Horizon Communications, Inc.

---

[1] News Analysis, Inc. was later added as a party plaintiff by Agreed Order. In this Opinion, we will refer to Mr. Gordon and News Analysis, Inc. collectively as "Plaintiff."

[2] Michael Roscoe, the president of Horizon Communications, Inc. executed the contract on behalf of Horizon Communications, Inc. and testified at trial on behalf of Horizon Communications, Inc. In this Opinion, we will refer to Horizon Communications, Inc. and Mr. Roscoe acting in his capacity on behalf of Horizon Communications, Inc. collectively as "Defendant."

OPINION

Background

Due to the nature of the issues raised on appeal, we find it necessary to discuss the evidence presented in this case in detail.

Plaintiff and Defendant executed a Representation Agreement ("the Contract") on March 1, 2001, which provided, in pertinent part:

> 1. **Term.** This agreement shall commence on March 1, 2001, and remain in full force and effect for one year from date, after which it may be terminated by either party providing 30 days notice.…
>
> * * *
>
> 3. **Responsibilities.**
>
> a. For each issue of DEALER magazine [Plaintiff] will provide the following:
>
> - Compilation of any/all news items of interest to franchised automobile dealers, to be edited by [Plaintiff] for publication in DEALER magazine
> - Analysis of news items published in DEALER magazine
> - A column highlighting [Plaintiff's] view of what dealers should be watching for from the manufacturers and possible actions and reactions
>
> b. [Plaintiff] will create an F&I section to be included in each issue of DEALER magazine to consist of news, analysis and insight specific to F&I, and the editing of said section.
>
> c. [Plaintiff] will initiate the development of new subject areas for DEALER magazine and the procurement of editorial and editorial contributors for such.
>
> d. [Plaintiff] will initiate the development of new features and the editing of such for DEALER magazine.
>
> e. [Plaintiff] will handle cover story and "Dealer Undercover" editorial functions for DEALER magazine at publisher's discretion.
>
> f. [Plaintiff] will compile and capture all relevant news information from all available editorial and print sources and edit such for inclusion in "Today's Dealer News" at www.dealeronline.com to be updated daily.

g. [Plaintiff] will assume responsibility of monthly assembly and production of each issue of DEALER magazine at the publisher's discretion.
h. For each issue of *Digital Dealer* magazine, [Plaintiff] will provide the following:

- Compilation of any/all technology-related news items of interest to franchised automobile dealers to be edited for publication in *Digital Dealer* magazine
- [Plaintiff] will assist editor of *Digital Dealer* in procuring content for *Digital Dealer* magazine

i. [Plaintiff] will assume responsibility of assembly and production of each issue of *Digital Dealer* magazine at the publisher's discretion.
j. [Plaintiff] will not contribute editorial to or represent or assist in any way any competing print or electronic publication as determined by publisher.

4. **Compensation.** Monthly retainer of $4,000, payable to News Analysis, Inc., payment of monthly phone, fax, mail and e-mail of approximately $300 per month. Reimbursement of travel expenses within 30 days when pre-approved by publisher.

Dealer Magazine is published by Defendant and is directed to franchise automobile dealers in the United States. All franchise automobile dealers are provided a copy of the magazine for free and given the option to decline receipt of future issues. The main source of revenue for Dealer Magazine is advertising.

In January of 2002, Plaintiff sued Defendant claiming, among other things, that Defendant had breached the Contract and had failed to pay Plaintiff the monthly retainer under the Contract for the months of July of 2001, through February of 2002. The case was tried without a jury in December of 2002.

At trial, Plaintiff testified that he is an automotive journalist and has worked primarily in the automotive business since 1944, with a focus on "automotive dealer issues as relating to the automotive industry." Plaintiff testified that he initiated the contact with Defendant that led to the execution of the Contract. Plaintiff wrote and submitted articles to Dealer magazine that were published in the April, May, June, July, August, September, and October of 2001 issues of the magazine. Plaintiff testified that he was paid under the Contract only for the months of March, April, May, and June of 2001.

Plaintiff testified that he was not paid under the Contract for the months of July, August, September, October, November, and December of 2001, and January and February of 2002. Plaintiff testified that he sent Defendant an invoice in June of 2001, for his monthly retainer fee plus phone, fax, and incidental travel expenses, but was not reimbursed for these expenses. The expenses on that invoice, not including the monthly retainer fee, totaled $238.52. Plaintiff admitted that

around July of 2001, he and Defendant discussed the possibility of reducing Plaintiff's monthly retainer. Plaintiff stated: "I felt that [Defendant] was unhappy with the fact that he was paying me more than he should have and he was very concerned about that,…." Plaintiff testified that Defendant never paid him any reduced amount, or any amount at all, after that conversation. Plaintiff testified that Defendant did submit another agreement for Plaintiff's consideration, a freelance writer agreement dated September 30, but it was not acceptable to Plaintiff. Plaintiff testified he received a letter from Defendant in September stating that Defendant was terminating the Contract.

Plaintiff testified that it was his understanding that he was to prepare all cover stories for issues following the March issue, which had already gone to press when the Contract was executed. He further testified that he understood that he was to prepare the "Undercover Dealer" feature for future issues and prepare a "column on my observations for future issues." The column of Plaintiff's observations was tentatively named "Gordon's Corner." Plaintiff testified that it was pretty standard for him to contribute four features for each issue, namely the cover story, the undercover story, Dealer News/Dealer Briefs, and the F&I article. Plaintiff claimed he submitted articles for a "Gordon's Corner" feature also, but these never were printed.

Plaintiff admitted that he received an e-mail from Defendant in early June of 2001, complaining about the length of the articles Plaintiff was submitting. Plaintiff admitted that the e-mail requested that the articles "[e]very one thereafter be three pages,…." When asked if he tried to comply with Defendant's request regarding the length of the articles, Plaintiff stated: "Well, I sought to try to comply, yes, depending on the nature of the subject." Plaintiff also testified: "There were some calls about length, and I assured [Defendant] that I would write as long as - - stories as long as the subject information went and I continued to do that." Plaintiff testified: "My response [to Defendant's complaints] was to continue writing and doing what I was asked to do and waiting for him to call me and ask me to come down or join him in preparation. And the things that were not, he did not follow up on in terms of helping with the magazine and furthering the cause of the magazine." When asked how long it takes him to write a two page article, Plaintiff stated: "Depending on the subject and the research involved, it can take as much as three hours to six hours."

Plaintiff admitted that he was aware that before he began writing the cover stories, the cover stories in Dealer magazine were "[a] few pages, four pages," sometimes five pages. Plaintiff admitted that the cover story he wrote for the June 2001 issue was a page and a half long. Plaintiff stated:

> [Defendant] felt that the articles needed to be longer and I felt that they needed to be the length that I felt that the subject warranted. So editorial judgment: He could have - - If he did not like the article as it was and he thought it should be longer, he could have asked me to make it longer. But I assumed that that was - - If there was an article that warranted five pages or a four page subject, a cover story, I certainly would have written it that long.…I didn't object to writing them longer, were (sic)

> the subject warranted for it. And I could have flushed it out and lengthened it and wrote it longer. But this was, I thought, an appropriate length for this particular article. Hearing no objection otherwise, once the article was submitted - - I mean, I had plenty of time to continue to lengthen it with features and sidebars and so forth. And, obviously, the magazine was filled with a lot of other things, which is fine.

The cover story that Plaintiff wrote for the August issue of Dealer magazine was two pages long. When Plaintiff was asked why the August cover story was only two pages, he stated:

> Again, the same explanation as the previous explanation; and not to forget that I was contributing a lot of other things. But in this case, again, this was the substance of the interview that I made and the material there. And, again, I was not asked to specifically submit a longer article. And, as was pointed out, there are a lot of other things in the magazine.

Plaintiff testified that he was not requested to submit a longer article "[o]n this specific article," even though he submitted this article after he received the e-mail complaining about the length of the articles.

Plaintiff also was questioned about the September cover story written about dealer David Wilson. This cover story consisted of one full page and one column of a second page. When asked why he couldn't find more information to write about Mr. Wilson who owns twelve dealerships, Plaintiff stated: "Well, in this case my interview with him was very brief and that was all - - He was - - I endeavored to pursue more material with him and he wasn't available."

Plaintiff admitted that he knew that Defendant wanted the "Dealer Undercover" feature to have two pages. The "Dealer Undercover" features that Plaintiff wrote for the June, August, and September issues of Dealer magazine each consisted of one page. The "Dealer Undercover" feature written for the July issue, consisted of a page and a half. Plaintiff admitted that the "Dealer Undercover" feature he submitted for October was about three-quarters of a page long. When questioned about the length of the October "Dealer Undercover" feature, Plaintiff stated: "I don't regard it as half of a feature. Some stories are longer than others and some stories are necessarily short. I don't think that that was underwritten at all on the basis of the information I had." Plaintiff testified that he noticed that the issues of Dealer magazine were getting smaller but stated he didn't think this was due to his failure to writer longer articles as requested. Instead, Plaintiff stated: "I think it was advertising content, and I was prepared to do whatever [Defendant] asked me to do."

Plaintiff was questioned about his duties under the Contract. He testified:

> I don't believe I procured any editorial contributors because I was not authorized to follow up and do so. Mention was never made of that by the appropriate - - by [Defendant] subsequent to the signing of the agreement.…it was my understanding

> that I would initiate finding editorial contributors for the magazine, only with the - - at the request of [Defendant]. I was not authorized to negotiate fees with any contributors. Mention was never made of finding contributors; and, on the contrary, mention was made that there was not much room. Room is lacking in the magazine.
>
> And I had thought of several contributors to contribute, but I did not pursue that because there was evidently no interest on his part in pursuing that.

Plaintiff further testified: "In terms of finding, in terms of recruiting contributors, that was never brought up as something 'Now we need contributors to follow up in that regard.'"

Plaintiff testified that he performed other contractual duties and stated:

> I proposed a number of new features - - real estate, dealership real estate developments; the area of labor relations; personnel hiring - - subjects for me to write on. I mentioned them to him, but no follow-up was - - On that subject no follow-up with "Go ahead and do that" came to my attention.

Plaintiff admitted that he never helped assemble the magazine and stated: "[Defendant] never asked me to do that." Plaintiff also admitted that he never assembled Digital Dealer Magazine or submitted any articles to the website for Digital Dealer Magazine and further admitted that he did not find and develop any F&I expert editorial contributors. Plaintiff stated: "I was the F&I expert editorial contributor."

When asked what Defendant was getting other than the articles Plaintiff was writing, Plaintiff stated:

> Me, Mac Gordon, dean of the auto - - And I was - - On my - - In the interest of going with him on sales calls, doing a lot of things, and contributing whatever else I could contribute and never was asked to contribute. He never brought me down to Columbia once to see how the magazine was put together or offered to join his advertising manager who lives in New York on sales calls. He never asked. And my role in the magazine was essentially limited - - not limited, but that was what I was doing and I thought that was more than sufficient.

Plaintiff testified:

> Well, I did a lot of things that aren't in the context of this agreement. What else did I do besides representing Dealer Magazine throughout the industry? Offering to do a column that was not used, offering to make sales calls, contacting advertisers and would be advertisers on the fact that I'm associated with the magazine, sending out public relations announcements about myself, continuing to represent the magazine on my constant travels throughout the industry.

> I think that's worth plenty and spending a lot of time doing things that were not included in the magazine before and have not been included since, such as the F&I stories, F&I developments, and dealer news briefs. So there was a lot I think I brought to the magazine that is within the context of this agreement, and doing all those lead stories that we mentioned. I certainly feel that was more than and beyond the call of a lot of things that were in the contract.

Plaintiff admitted that the Contract stated he had a responsibility to write five columns a month. Plaintiff stated: "Well, it says so here, but the responsibility is contingent on the writer and it's contingent on the editor. If he's not using the columns, he or she, then there's not much I can do about it. But to continue writing a column that's going nowhere is ridiculous." When asked if he ever submitted the column highlighting views of what dealers should watch for from the manufacturers, Plaintiff stated: "Well, I think it was more than one time. There were several columns written and neither was used."

Plaintiff testified that Defendant requested that he write eight cover stories in advance, but Plaintiff chose not to do so. Plaintiff stated:

> Well, it's just too soon before publication to do something like that. The dealership business is changing constantly, and I felt two or three months in advance was plenty of time to do those stories. I was not adverse to doing them; but on a timely basis, when it was fresh and there was no danger that things might change with the dealership and so forth. It was too early in that business.…He named some dealers that I was preparing to do and I did them, and I was going to go on and do some of the others. Some of them were not able to be done at that time. Others, it just was -- just seemed to me to be difficult to do them all at one time and then have to go back through them later on if things changed and so forth.…Well, I thought it would be difficult.

Plaintiff further stated:

> Cover stories take some time and research and writing and all the rest, and I was preparing to do them on a timely basis as well as everything else I was doing for the magazine in each issue. I was doing an awful lot, I thought. So to set aside time for the cover stories, one or two a month, that would have been done had the relationship continued.

Plaintiff admitted that he submitted four articles to a competing magazine, Ward's Dealer Business, in early 2001, prior to the execution of the Contract and was paid $550 total for these four articles. Plaintiff testified that the payment for those four articles was based upon the standard freelance rate, which Plaintiff testified is up to $600 a page for contributions. In addition, Plaintiff testified that he currently is submitting articles to Ward's and that Ward's is paying him on the basis of $600 a page for articles.

Defendant had other complaints in addition to the complaints about the length of the articles Plaintiff was writing. The "Dealer Undercover" feature that Plaintiff wrote for the July issue of Dealer magazine featured a question and answer session with an unidentified Auto Nation dealer. In this feature, the unidentified dealer accused Auto Nation of potentially criminal behavior. Michael Maroone, the president of Auto Nation, Inc., allegedly attempted to identify the unnamed dealer based upon information given in the "Dealer Undercover" feature and complained to Defendant that Mr. Maroone was unable to find a dealer who fit the profile given in the feature. Mr. Maroone insisted on knowing whether the feature was written about an actual dealer, or was simply fiction. When Defendant asked, Plaintiff refused to reveal his source to Defendant. At trial, Plaintiff testified that the unidentified dealer source is no longer an Auto Nation dealer.

Problems also arose in regard to the cover story that Plaintiff wrote about dealer David Wilson for the September issue of Dealer magazine. After the interview with Mr. Wilson was printed, Mr. Wilson complained about inaccuracies in the article including the fact that he had been incorrectly identified as a Vietnam war veteran. When asked about this mistake, Plaintiff stated:

> I looked up my notes and I somehow got the impression that he had been in the Service during the Vietnam war, and that may not be right. But, if that was a mistake, I - - mistakes are made along those lines all the time. Even the New York Times and the Wall Street Journal run daily lists of corrections. I said "Well, let's correct it in the next issue. I'm sorry I made it." It's something that slipped in and I regretted it.

Plaintiff testified that he recalls sending a copy of the article to Mr. Wilson before it was printed, but Mr. Wilson claimed he never received such a copy.

Defendant also testified at trial. Defendant testified that "[he and Plaintiff] talked a lot about a lot of things that weren't supplied." Defendant explained his intentions in entering into the Contract stating:

> It was my intention that after he came on and did the things that I was already doing - - Keep in mind I was doing the cover stories. I was doing Dealer Undercover. They were the proper length. It cost me nothing.
>
> What I hoped to get was get ahead on the cover stories, get ahead on the Dealer Undercovers, add some other sections. The F&I section wasn't what it was supposed to be. Dealer Undercover was short. The cover story was short. I don't have confidence that he can handle these other things, so I'm not going to ask him to [assemble the magazine] until we can straighten out the other simple things.

Defendant testified that "[t]here was only one Dealer Undercover article out of the six that was of the required length. No cover story article out of six was the required length, not one." Defendant stated:

> I was expecting [Plaintiff] - - As a journalist with fifty years experience touching all aspects of this industry, I was expecting him to know the best way to do this. Remember, he's Mac Gordon. Part of what he said I was paying for was his name and his experience, and part of that is what I'm counting on to get these things done. I didn't think I had to baby-sit somebody and chase them down to get stuff in that was specified in the agreement.

Defendant testified that Plaintiff did not submit a column highlighting his views of what dealers should watch for from the manufacturers. Defendant admitted that he rejected several articles submitted by Plaintiff and stated:

> At the time of putting the magazine together, things come in, articles come in. You look at it and you say "This is of interest to my readers" or it's not. I believe there was an interview with a subprime finance manager that was not specifically requested that was submitted. For all I know, it was written for another magazine, not used, and sent over to me. But it was not appropriate and I did not feel we should use it. It was not even something that was required in the agreement.

Defendant testified that the interview with the subprime finance manager would not have fit under the category of a "Gordon's Corner" article. Defendant testified that he never received any articles from Plaintiff that would have fit into the "Gordon's Corner" category.

Defendant also testified about the provision in the Contract that provides that "[Plaintiff] will create an F&I section to be included in each issue of DEALER magazine to consist of news, analysis and insight specific to F&I, and the editing of said section." Defendant testified:

> [Plaintiff] did evidently check the news wires and pull out a few news items that were there. But it was supposed to be an entire section, not just a page or two of news items that could have been picked up in Automotive News or on the AP news wire.
>
> It was supposed to be a section specifically for F&I and it never was that. All it ever was was a page or two or three-quarter pages of news items.

Defendant further testified:

> Frankly, the F&I section was not as much of a problem. It wasn't as critical. There were two pages of content there. I was more interested in getting cover stories of the appropriate length and Dealer Undercover interviews of the appropriate length, and

> I wanted to get that right before I worried about expanding sections that I didn't even have before [Plaintiff] came on.

Defendant testified that Plaintiff never gave him a list of potential editorial contributors. Defendant stated:

> He mentioned a few areas that might be of interest, which is nice. It's a good place to start, but I'm expecting a person with fifty years of experience in the business - - me with six or so years experience at the time - - to initiate the development. It didn't say talk about it or offer some suggestions. It says initiate the development of new features.
>
> He's the expert. He's been in the business fifty years. He's the self-purported dean of the industry. I didn't think it was up to me to get him to do these things. One of the reasons I paid a lot of money for him to come on board was for him to do those things; not to be as an employee that I have to chase around to get these things done, but to pick up the ball and run with it and do it.

Defendant testified regarding his complaints about the length of the articles that Plaintiff was writing. Defendant stated:

> [B]efore [Plaintiff] came to do work for me we were always at least three pages in the cover story, sometimes more. We were always at least a page and a half in Dealer Undercover, sometimes more. After he left we've always been at least three pages with the cover story, sometimes more. We've always been at least a page and a half with Dealer Undercover, sometimes more.
>
> I don't know where he comes up with his judgment it didn't need to be any longer than that. I asked him multiple times after the first issue that he submitted those columns - - they were too short - - and every time thereafter, up to sending him an e-mail saying "This is not acceptable. I cannot have the magazine changed like this."

Defendant testified that it is important that the cover story be at least three pages because it is the main feature of the magazine. He stated:

> It's why dealers picked up my magazine in the first place. Dealers get incredible amount of mail - - a lot of junk mail, a lot of direct mail. There are four - - at the time four or five magazines and publications out there for them.
>
> You have to have something that's going to get them to pick that magazine up and say "I'll take a look at this," and what I hung my hat on was a cover story on the most successful dealers in the country.

Defendant further explained the importance of the length of the stories and stated:

> Well, when features start shrinking, it's a sign that maybe this feature is not important. When advertisers, potential advertisers, printers see what was the flagship editorial piece of my magazine shrinking down to half its size, I think that's a clear indication to them "This is not that big of a deal. This is not important or maybe they're just not paying attention over there anymore."

Defendant testified that prior to the execution of the Contract, he wrote all of the cover stories. He stated:

> I know when I do the cover stories - - and I did them from the very first one until [Plaintiff] did his and picked it up right afterwards - - I spent forty-five minutes to an hour on the phone. I had plenty of questions to ask, with follow-up questions already available. I never once had a dealer tell me they had to leave and, if they would have, I would have said "When can we pick it up again?" And, if we didn't get all the questions done, I would at that point - - not at layout, at that point I would find somebody else because there's a minimum amount of space that the cover story requires. It's our signature, the cover story.

Defendant testified regarding how seriously he viewed Plaintiff's failure to comply with Defendant's requests and stated:

> When the dealer advocate columns that were a page and a half with me and a page and a half with me after, when they start shrinking down and they don't really talk about that much or, even worse, when one of them is allegedly not even a dealer - - told to me by Mike Maroone, after they profiled their people - - and when it's refused to be revealed to me so I can know that, yes, a dealer said this? I can't have somebody come between me and the dealers. My relationship with dealers is why I have a magazine. It's why I have a business. It's how I feed and clothe and shelter my family. And when somebody compromises that it's a scary thing.

Defendant testified about his request that Plaintiff write cover stories early so that they could sell advertising based upon the future cover stories. Defendant stated:

> What I used to do, when it was me doing it all, is not only would I interview [cover story subjects]. I'd find out who their vendors were. I would find out who they did business with.
>
> When you've got one of the top Toyota or the top Ford or the top Chevy dealer in the country on the cover of your magazine and a three page article about them and you go to their vendors, their finance company, their main insurance company, their car wash company and say "Hey, your client is going to be our cover

> story. Why don't you advertise and let the rest of America's dealers know that this giant of the industry does business with you?"…It's not just a matter of saying "So and so is on the cover." If it's not a customer of theirs, they're not that interested in it. But when it's their client, when you can find out who does business with this person, that's something I had done and that's something that was never done. It was important for us.
>
> At one point we were getting $12,000, averaging $12,000 of revenue per issue off of cover story vendors. One issue with dealer Don Massey in the Detroit area, who is the number one Cadillac dealer, we sold $25,000 worth of advertising to his vendors. It was over a third of our total revenues that issue. This was very important to us.

Defendant testified that Plaintiff never submitted anything for "dealeronline.com." Plaintiff provided a few items on technology related news, but Defendant testified Plaintiff did not provide what he was required to under the Contract. Defendant stated:

> it was supposed to be any and all technology related news items. It wasn't supposed to be him deciding or using his journalistic judgment of what's important or what isn't. It's supposed to be everything that came out since the last issue of the magazine so that I could decide what was to be involved.

Defendant admitted that he never asked Plaintiff to assist in compiling the magazine because

> I couldn't get him to follow simple instructions like "The cover story needs to be three pages. The Dealer Undercover needs to be a page and a half." I certainly couldn't turn over something like that to somebody who can't follow a simple instruction. He was not providing me the correct amount of editorial. I sure couldn't have him handle layout design.

Defendant also testified about the problems experienced when Mr. Wilson became upset about the mistakes in the September cover story. Defendant explained:

> It was very important to me that we send the articles back to the dealers [prior to publishing them].
>
> I wanted them to know that they could speak freely and not be afraid that something they said would be misinterpreted or used against them or they would give away some secret that they wished they hadn't or that they would mispronounce or misspell an employee's name. It always went back to them.

Defendant stated: "The New York Times will have mistakes every day. They're on a twenty-four hour cycle. There's weekly magazines that are one a one week cycle. My magazine is on a one month cycle. We're not in such a rush that we can't get things correct."

Defendant testified regarding what he paid Plaintiff under the Contract. Defendant explained:

> the first [payment] was for April. He got $4,000 for one, two page article. My expectation was this was going to be a long term thing. He told me that my magazine was going to look more like the other traditional magazines in the marketplace, and he told me what he was going to do to effect that change. So fully believing that would be the case and that he would abide by our agreement, I had no problem writing him a $4,000 check for writing one article.

Defendant testified he paid Plaintiff a total of $16,000 plus expenses and then stopped paying him because

> I couldn't get his attention: Not very good at responding to e-mails, difficult to get on the phone, not willing to make the articles the length I insisted they needed to be.
>
> We also had the situation with Auto Nation, a very precarious situation for my business and the survival of it. Would not cooperate, just kept telling me "Oh, the dealer says he stands by it." I was not asking him if the dealer stood by it. I was asking him who was the dealer, "I need to speak to them to find out if this is legitimate. If it is, then I know how to approach Auto Nation. If it's not, I need to know that, too." Never would divulge that information to me.…[A]nd I wasn't willing to spend $48,000 until the contract was over for nothing, for four articles an issue, two of them always too short, some of them fabricated.…I always thought that he would at some point perform, that he would listen to what I told him and he would do it. It never happened. I felt I had no choice but to stop paying him to get his attention so that he would finally understand the importance and, even if he doesn't understand the importance of the length of these articles and not fabricating information in cover stories, that at least he wouldn't do it because his payment was dependent on it.

Defendant admitted that he published Plaintiff's articles in the July, August, September, and October issues. Defendant testified: "I paid $16,000 for about $4,000 worth of work."

When asked, Defendant testified that he would not have revealed to Auto Nation the name of the undercover source used for the July "Dealer Undercover" feature. Defendant stated: "If I compromised the dealer in that Dealer Undercover to Mike Maroone, I've just lost all credibility as a magazine and as a business and I'm no longer the dealer's friend and the dealer advocate."

After trial, the Trial Court entered a very detailed and extensive order on March 18, 2003, finding and holding, *inter alia*:

> 11. [Plaintiff] had several obligations under the agreement as set out in paragraph 3 of the contract.…
>
> * * *
>
> 12. [Plaintiff] failed to perform any of the duties in items [3. f and h of the Contract].
>
> 13. [Plaintiff] failed to perform some of the duties in items [3. c of the Contract] (procurement of editorial and editorial contributors).
>
> 14. [Plaintiff] failed to provide content consistent with the prior issues of the magazine as to length as required by [Defendant]. In addition, the plaintiff failed to divulge a source for one article so that [Defendant] could determine if the source actually existed, and [Plaintiff] provided a feature article that misrepresented the military record of the featured dealer for that month. Both of these matters could have exposed [Defendant] to legal actions or the printing of costly and embarrassing retractions.
>
> 15. [Plaintiff was] not asked to perform other duties "at the publisher's discretion" because [Plaintiff was] negatively affecting the defendant's publications with short articles and questionable content.
>
> * * *
>
> 20. While the defendant continued to publish the articles submitted by [Plaintiff] for months when there was no payment, the defendant was forced to use that content due to the exigencies of the circumstances. In other words the items used would have otherwise been a void in the magazines.
>
> In support of the its findings the Court submits the following conclusions of law:
>
> * * *
>
> 4. [Plaintiff] failed to perform all the responsibilities set out in the parties' agreement. Some of these failures involved a total failure to perform some items. Other failures on [Plaintiff's] part were breaches of the agreement because [Plaintiff] knew of the type publication that [Defendant] was publishing and the nature of the content and length of those items. None of the cover articles submitted by [Plaintiff] were the length required. This is true despite the continued requests of the defendant to have

the articles be of a length as in the past and by implication the requirements of the contract. ([Plaintiff] testified that he was familiar with the magazine and its content prior to the agreement.)…The plaintiff has materially breached the agreement and cannot recover under it.

5. The plaintiff has failed to carry its burden of proof as to the value of any services actually conferred on the defendant after June, 2001. This is particularly true in light of the duties of the plaintiff under the agreement that the plaintiff never fulfilled.

* * *

7. In the case before the Court, to find for the plaintiff would deprive the defendant of significant benefits required from [Plaintiff] by the agreement. [Plaintiff's] continued response as to why he and his company had failed to undertake certain responsibilities under the agreement is that no one had told him to do these things. (*i.e.* compiling articles for the web site.) In addition, [Plaintiff's] continued refusal to conform the cover articles and the *Dealer Undercover* articles after repeated demands essentially deprived the defendant of the benefit of the agreement that the defendant expected. [Plaintiff has] been overcompensated for the material that was produced. [Plaintiff was] never able or willing to cure the defects in [Plaintiff's] performance.…

* * *

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that:

1. Plaintiff's Complaint be and is hereby dismissed;

Plaintiff filed a motion to alter or amend, which the Trial Court denied. Plaintiff appeals to this Court.

Discussion

Although not stated exactly as such, Plaintiff raises three issues on appeal: 1) whether the Trial Court erred in holding that Plaintiff materially breached the Contract; 2) whether the Trial Court erred in holding that Defendant did not waive any breach by its continued acceptance of articles from Plaintiff; and, 3) whether the Trial Court erred by failing to hold that Defendant breached the Contract. Defendant raises an issue about whether Maynard M. Gordon is a proper party to this action.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of

law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In resolving a dispute concerning contract interpretation, a court's task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language. *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 889-90 (Tenn. 2002)(citing *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999)). A determination of the intention of the parties "is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide." *Planters Gin Co.*, 78 S.W.3d at 890 (citing 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998); *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001)). The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement governs. *Planters Gin Co.*, 78 S.W.3d at 890. The parties' intent is presumed to be that specifically expressed in the body of the contract. "In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy." *Id*. (quoting 17 Am. Jur. 2d, *Contracts*, § 245).

We begin by addressing whether the Trial Court erred in holding that Plaintiff materially breached the Contract. The Contract language is clear, definite, and undisputed. The evidence, as already discussed in detail, shows that Plaintiff admitted he never submitted any articles to the website for Digital Dealer Magazine and never found and developed any F&I expert editorial contributors. Plaintiff claimed that he did not procure editorial contributors because " I was not authorized to follow up and do so," despite the fact that the Contract provides "[Plaintiff] will initiate the development of new subject areas for DEALER magazine and the procurement of editorial and editorial contributors for such." Plaintiff further admitted that the Contract stated he had a responsibility to write five columns a month and that he only submitted four. In regard to the Contract provisions detailing a responsibility to write five columns per month, Plaintiff stated: "Well, it says so here, but the responsibility is contingent on the writer and it's contingent on the editor. If he's not using the columns, he or she, then there's not much I can do about it. But to continue writing a column that's going nowhere is ridiculous." Defendant testified that Plaintiff never submitted any articles that would fit into the "Gordon's Corner" category of articles highlighting views of what dealers should watch for from the manufacturers. Plaintiff testified: "Well, I think it was more than one time [that I submitted such an article]. There were several columns written and neither was used." In addition, Defendant testified that Plaintiff provided a few items on technology related news, but Defendant testified Plaintiff did not provide what he was required to under the Contract.

The evidence further shows that Plaintiff was aware of the content and length of the articles in Dealer magazine prior to the execution of the Contract and yet none of the cover articles submitted by Plaintiff were the required length, and only one out of six of the "Dealer Undercover" features was the required length. The evidence further shows that Plaintiff continued to write and

submit articles that did not meet the required length even after repeated requests and demands from Defendant regarding the length of the articles.

The evidence does not preponderate against the Trial Court's findings, and the Trial Court did not err in holding that Plaintiff had materially breached the Contract by failing to complete numerous duties as outlined in the Contract and by failing to perform other duties to the appropriate standard as intended under the Contract.

We next consider whether the Trial Court erred in holding that Defendant did not waive any breach by its continued acceptance of articles from Plaintiff. As this Court stated in *Tennessee Adjustment Serv., Inc. v. Miller*: "It seems to be the rule generally that strict performance of a contract by one party may be waived by the other party, and conditions precedent may be waived by the party in whose favor they are made." *Tennessee Adjustment Serv., Inc. v. Miller*, 390 S.W.2d 696, 701 (Tenn. Ct. App. 1964) (quoting *Morristown Lincoln-Mercury, Inc. v. Roy N. Lotspeich Publ'g Co.*, 298 S.W.2d 788 (Tenn. Ct. App. 1956)). "It is elemental a waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such intent." *Id*. at 702.

Plaintiff argues, in part, that Defendant waived any breach by continuing to accept and publish the articles written by Plaintiff. Plaintiff fails to note, however, that Defendant did not simply accept the articles, but instead complained numerous times about the length of Plaintiff's submissions. Plaintiff admits that Defendant made requests regarding the length of the articles both verbally and in writing starting from the time that Plaintiff submitted his first articles and continuing until Defendant provided Plaintiff with notice of terminating the Contract. Defendant continually demanded that Plaintiff write longer articles, and Defendant's conduct does not warrant an inference of an intent to waive any rights.

The evidence does not preponderate against the Trial Court's findings, and we hold that the Trial Court did not err in holding that Defendant did not waive any breach by Plaintiff. Plaintiff had the burden of proving waiver, and he failed to do so.

We next consider whether the Trial Court erred by failing to hold that Defendant breached the Contract. Plaintiff argues, in part, that Defendant breached the Contract by continuing to accept and publish articles from Plaintiff after Defendant stopped paying Plaintiff. In essence, Plaintiff asserts that he is entitled to be paid under the Contract at least for the months of July through October of 2001.

"[T]here can be no recovery for damages on the theory of breach of contract by the party who himself breached the contract." *John P. Saad & Sons, Inc. v. Nashville Thermal Transfer Corp.*, 715 S.W.2d 41, 47 (Tenn. 1986) (quoting *Santa Barbara Capital Corp. v. World Christian Radio Found., Inc.*, 491 S.W.2d 852, 857 (Tenn. Ct. App. 1972)). As discussed above, we have affirmed the Trial Court's decision that Plaintiff materially breached the Contract and Defendant did not waive Plaintiff's breach.

We note that Plaintiff's appellate brief admits that Plaintiff is not seeking relief under a theory of implied contract or quantum meruit. Plaintiff's appellate brief states:

> The Trial Court also held [Plaintiff] "has failed to carry its burden of proof as to the value of any services actually conferred on the defendant after June, 2001." However, this Court overlooks that this case is presented on an express contract, and not an implied contract. The value of [Plaintiff's] services is determined by the Agreement…

Plaintiff acknowledges that he is seeking relief only under the Contract. Plaintiff materially breached the Contract. As Plaintiff is the party who breached the Contract, we find no error by the Trial Court in failing to hold that Defendant breached the contract. We, therefore, hold that Plaintiff is not entitled to relief.

Finally, we consider Defendant's issue regarding whether Maynard M. Gordon is a proper party to this action. Defendant argues Mr. Gordon is not a proper party to this action. We are at a loss as to why Defendant attempts to raise this issue as the Trial Court held exactly that. Specifically, the Trial Court held as one of its conclusions of law that "[w]hile Maynard Gordon was the president of News Analysis, Inc., he is not a proper party to this action since the contract was between Horizon and News Analysis." Further, Plaintiff takes no real issue on appeal with this specific holding of the Trial Court. This being so, we fail to see how Defendant can argue that the Trial Court erred on this issue. As such, we need address it no further.

We affirm the Trial Court's March 18, 2003 order in its entirety.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellants, Maynard M. Gordon d/b/a News Analysis and News Analysis, Inc., and their surety.

_____

D. MICHAEL SWINEY, JUDGE